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Private Law: Persons

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The Work of the Louisiana Appellate Courts for the 1974-1975 Term

A Symposium

[*Editor's Note.* The articles in this symposium discuss selected decisions of Louisiana appellate courts reported in the advance sheets dated July 1, 1974, to July 1, 1975.]

PRIVATE LAW

PERSONS

*Katherine Shaw Spaht**

JURISPRUDENTIAL DOCTRINE OF RECRIMINATION

The long established jurisprudential doctrine of recrimination[1] was again invoked in two recent courts of appeal decisions to deny the parties a separation from bed and board.[2] Historically, the doctrine of recrimination was borrowed from the common law and rests on the equitable principle that "he who comes into equity must come with clean hands. . . ."[3] Repeatedly, the Louisiana Supreme Court has held that when the husband and wife are both at fault, neither party can obtain a separation or divorce.[4] Before this doctrine can be invoked, there must be a finding that the

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* Associate Professor of Law, Louisiana State University. In this issue there appears a student note which discusses two recent cases expanding the rights accorded to putative spouses, *King v. Cancienne*, 316 So. 2d 366 (La. 1975) and *Cortes v. Fleming*, 307 So. 2d 611 (La. 1973).

1. Eals v. Swan, 221 La. 329, 59 So. 2d 409 (1952); Snell v. Aucoin, 158 La. 767, 104 So. 709 (1925); Amy v. Berard, 49 La. Ann. 897, 22 So. 48 (1897); Castanedo v. Fortier, 34 La. Ann. 135 (1882); Trowbridge v. Carlin, 12 La. Ann. 882 (1857); Durand v. Her Husband, 4 Mart. (O.S.) 174 (1816).

2. Schillaci v. Schillaci, 310 So. 2d 179 (La. App. 4th Cir. 1975); Maranto v. Maranto, 297 So. 2d 704 (La. App. 1st Cir. 1974).

3. 27 C.J.S. *Divorce* § 67, 225-28 (1959): "As a general rule, . . . divorce is a remedy for the . . . innocent against the guilty. . . . If both parties are equally at fault, a divorce will not be granted." The doctrine of recrimination rests on the concept that he who seeks redress for the violation of a contract resting on mutual and dependent covenants must himself have performed the obligations on his part.

4. *E.g.*, Eals v. Swan, 221 La. 329, 59 So. 2d 409 (1952).

fault of both parties is of the same character and of equal proportions.[5]

In *Maranto v. Maranto*[6] the wife sued the husband for a separation from bed and board on the grounds of cruel treatment and abandonment.[7] The husband reconvened, seeking a separation on the basis of the wife's cruel treatment and abandonment. The court found that both parties had been at fault[8] in the deterioration of their thirty-year-old marriage, which incidentally had produced ten children.[9] Since neither party was less at fault than the other, the court dismissed their claims. In *Schillaci v. Schillaci*[10] the wife filed a petition for separation against her husband on the basis of his cruel treatment and abandonment. The husband, in turn, reconvened for a separation on the ground of cruel treatment. Unquestionably, each party had committed serious marital wrongs towards the other during their twenty-three years of marriage.[11] The Fourth Circuit Court of Appeal affirmed the

5. *Id.*; Armentor v. Gondron, 184 La. 922, 168 So. 102 (1936); Ducros v. Ducros, 156 La. 1033, 101 So. 407 (1924); Duhon v. Duhon, 110 La. 240, 34 So. 428 (1903).

6. 297 So. 2d 704 (La. App. 1st Cir. 1974).

7. LA. CIV. CODE art. 138.

8. Maranto v. Maranto, 297 So. 2d 704, 705 (La. App. 1st Cir. 1974). Four years prior to the parties' separation the husband choked the wife, his reason being that his wife refused to have sexual relations with him. After that occasion the wife continued to refuse to have sexual relations with her husband and shared a bedroom with one of the ten children. The wife stated that the husband constantly accused her in front of others of being mentally ill. A second incident of alleged physical cruelty by the husband occurred when the husband pinched the wife on the toe and she responded by calling him a bastard. Thereafter, each party struck the other and a pushing contest ensued.

9. *Id.* at 706. "We are of the opinion that had either party to this litigation relented in the wrongs claimed by the other, that their marriage would not have deteriorated to the point of no return. In essence, we find mutual fault." Unquestionably, the husband had been guilty of cruel treatment towards the wife. The most serious cruel treatment was his accusations of the wife's mental illness. Apparently, the majority of the court felt that the wife, too, had been guilty of cruel treatment towards the husband, evidenced by her repeated refusal to engage in sexual intercourse. The court cited *Phillpott v. Phillpott*, 285 So. 2d 570 (La. App. 4th Cir. 1973) which was noted by this author in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Persons*, 35 LA. L. REV. 259 (1975). The author of the dissenting opinion in *Maranto* agreed with the trial court, which had granted the wife the separation. Because there was a factual basis for the trial court's findings, the dissenting judge felt there was no manifest error.

10. 310 So. 2d 179 (La. App. 4th Cir. 1975).

11. *Id.* at 180.

trial court's dismissal of both claims on the basis of recrimination.

Paradoxically, when the doctrine of recrimination is properly invoked, the result is that two individuals who have demonstrated their inability to live together must suffer subsequent indignities before the "knot" can be legally "untied." The result of applying the doctrine of recrimination is both unrealistic and unsupported by the legislation.[12] As long as the judiciary continues to invoke this doctrine, further justification exists for the writer's suggestion concerning no-fault separation—that either spouse be permitted to obtain a separation on the basis of living separate and apart for thirty days.[13] This would eliminate the unseemliness of a public trial in which the parties hurl accusations and recriminations at one another. More importantly, when a marriage has deteriorated such that the spouses' common life is intolerable,[14] judicial relief could be obtained by either party without the frustration caused by an equitable but unrealistic doctrine.[15]

ALIMONY AFTER DIVORCE

As early as 1950 the Louisiana Supreme Court in *Smith v. Smith*[16] considered the requirement found in Louisiana Civil Code article 160[17] that the wife be without "sufficient means

12. LA. CIV. CODE arts. 151-53; R. PASCAL, LOUISIANA FAMILY LAW COURSE 122 (1974): "The exception of mutuality of fault may be reasonable enough if the degree of seriousness of fault is about the same, even if not of the same kind, *as long as the common life is not intolerable* for the spouses" (emphasis added).

13. *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Persons*, 35 LA. L. REV. 259, 265 (1975); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Persons*, 34 LA. L. REV. 201, 203-04 (1974).

14. In both *Schillaci* and *Maranto* the courts of appeal recognized that the respective marriages of the spouses had deteriorated. In *Schillaci*, the court cited the trial judge's opinion that the marriage had disintegrated to a point where each party was enjoying the hostilities demonstrated towards the other. In *Maranto*, the court found that "had either party to this litigation relented in the wrongs claimed by the other, . . . their marriage would not have deteriorated to the point of no return" (emphasis added).

15. R. PASCAL, LOUISIANA FAMILY LAW COURSE 122 (1974): "It [doctrine of recrimination] has no role, and is not invoked, in suits for separation based on living separate and apart by mutual agreement for one year or for divorce founded on living separate and apart for two years."

16. 217 La. 646, 47 So. 2d 32 (1950).

17. Prior to the 1964 amendment to LA. CIV. CODE art. 160, it read in part: "If the wife who obtained the divorce *has not sufficient means for her maintenance*, the Court may allow her in its discretion . . . alimony . . ." (emphasis added).

for her maintenance" to be eligible for alimony after a divorce. The court interpreted the language to mean sufficient property, including capital assets,[18] to provide primarily food, shelter and clothing.[19] By virtue of a partition of the community property, the wife's assets, valued at approximately $20,000, consisted of seven United States Government War Bonds, a 1948 Pontiac automobile, and the balance in notes of her husband bearing interest at 2% per annum. In answer to the question " 'Can a wife who is in possession of property and assets valued at $20,000 be said to be without sufficient means for her maintenance?' "[20] the court responded negatively. The more difficult question, "[t]o what extent should the wife be required to exhaust her capital before seeking alimony," was purposely left unanswered by the court.[21]

In 1973 the Louisiana Supreme Court again elaborated on the meaning of "maintenance":[22]

> Common sense dictates that the term "maintenance," while meaning *primarily* food, clothing and shelter, does include such items as reasonable and necessary transpor-

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The 1964 amendment to LA. CIV. CODE art. 160 changed in some respects the text of the article, which in part provides: "When the wife has not been at fault, and she *has not sufficient means for her support*, the court may allow her . . . alimony . . ." (emphasis added). The pertinent portion of article 160 differs little in content before and after 1964. In *Smith* the court recognized that a distinction exists between alimony pending suit for separation and divorce under LA. CIV. CODE art. 148 and alimony awarded to the wife after divorce under article 160. Prior to 1964 both article 148 and article 160 used the word "maintenance"; and presumably, the amendment to article 160 substituting the word "support" for "maintenance" was to legislatively recognize the jurisprudential distinction.

18. This interpretation of the word "means" was essentially to distinguish it from the word "income" in LA. CIV. CODE art. 148.

19. Smith v. Smith, 217 La. 646, 654, 47 So. 2d 32, 35 (1950). According to the court, "It is not to be inferred . . . that the wife must be practically destitute before she can act. In fact the language of article 160 implies the opposite because it expressly stipulates that it is in case she has not *sufficient* means that she can apply for the alimony from which it follows that she may have *some* means." *Id.*

20. *Id.*

21. *Id.*: "How far she should go in depleting her capital presents another question. Whilst we do not think that she should be made to use it all, on the other hand, we do not believe that the law intends that she can maintain it intact . . . . To what extent the wife should be made to use up her capital before applying for the alimony is a matter with which we are not concerned at this moment."

22. In 1973, LA. CIV. CODE art. 160 no longer contained the word "maintenance"; the word "support" had been substituted.

> tation or automobile expenses, medical and drug expenses, utilities, household expenses, and the income tax liability generated by the alimony payments made to the former wife.[23]

Thus, in recognition that modern-day expenses generally considered necessary have increased, the court liberally redefined "maintenance."

Subsequently, the majority of the Louisiana Supreme Court in *Frederic v. Frederic*[24] introduced a new element into the determination of whether a divorced wife has "sufficient means for her support" under Article 160—liquidity of her assets. In *Frederic* the estimated net value of the community property, which had not been partitioned, was $188,900. Without proving that her interest was insufficient for her support, the wife claimed that until the community property was partitioned and liquidated she had no "practical" means for her support.[25] Between the dates suit was filed and arguments were heard, the wife had received a check in the amount of $20,700, representing one-half of the sale price of part of the community immovables. According to the court, "This amount [$20,700] was liquid and is available for her support."[26] By relying on *Smith* yet making allowances for the difference in money values,[27] the court denied the wife post-

23. Bernhardt v. Bernhardt, 283 So. 2d 226, 229 (La. 1973). The Court of Appeal for the First Circuit took an interesting approach in applying the new definition of "maintenance" in article 160 to the facts of *Hughes v. Hughes*, 303 So. 2d 766 (La. App. 1st Cir. 1974). Examining a list of the wife's expenses, the court accepted as valid those that could be fit into various categories such as reasonable and necessary transportation or automobile expenses, medical and drug expenses, utilities, household expenses, and income tax liability. The court in *Hughes* awarded the wife alimony in the sum of $1,500 per month based upon her proven expenses and the husband's ability to pay.

In *Mendoza v. Mendoza*, 310 So. 2d 154, 157 n.4 (La. App. 4th Cir. 1975) the Court of Appeal for the Fourth Circuit noted in a footnote: "In calculating an appropriate amount for maintenance, we included the amounts submitted for payments on the house, gas, electricity, water, telephone and maintenance of an automobile and medical bills. We did not include the amounts submitted for yard maintenance, medical insurance, automobile insurance, house insurance and charitable contributions."

24. 302 So. 2d 903 (La. 1974).

25. The court was no doubt impressed with evidence that the wife's intractability had been the major reason partition of the community property had not yet been accomplished. *Id.* at 906.

26. *Id.*

27. "Making allowances for the differences in money values, the similar-

divorce alimony. Although the court did not give definitive reasons, it mentioned the wife's undivided interest in property valued in excess of $73,000, in addition to $20,700 cash. Hence, it presented a stronger case for denying post-divorce alimony than *Smith*. Justice Tate[28] disagreed in certain respects with the holding of the majority: " 'Until the estate is partitioned and Mrs. Frederic is placed in possession of liquid, liquidable or income-producing property she has no practical means for her support and is entitled in that respect to Article 160 alimony.' "[29] Nonetheless, he admitted that a "closer question is presented" once the wife had received the $20,700 check.[30]

After a careful reading of *Frederic*, one might reasonably conclude that the first step in determining whether a wife is without "sufficient means for her support" is to separate her liquid from nonliquid assets. The First Circuit Court of Appeal utilized this approach in *Webster v. Webster*[31] and *Bryant v. Bryant*.[32] In *Webster* the wife had received in the community property settlement $4,850 cash (reduced by the time of the trial to $3,300), matured bonds valued at $650 and an unencumbered house worth $9,500.[33] In addition, she had earned $150 per month for nine months of the year. According to the court, her liquid assets, the cash and matured bonds, had to be depleted to provide the wife food and clothing before she would be entitled to alimony.[34] In *Bryant* the wife had a

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ity of the issue in *Smith v. Smith* to the instant case is notable. Moreover, the facts in the *Smith* case are not as strong for denying alimony as are the facts in the case at bar. In the *Smith* case the wife had no liquid assets, only property . . . ." *Id.* at 907.

28. Justice Tate concurred in part of the majority opinion and dissented in part. "As to the disallowance of post-divorce alimony, I particularly dissent from the holding that the wife had no right to alimony because she owned an interest in indivision in assets of the former community, a large part of which is a stock interest in a corporation controlled by the husband. I would therefore affirm the initial award of post-alimony." *Id.* at 908.

29. *Id.* at 909. See the court of appeal decision in the same case, 295 So. 2d 52 (La. App. 4th Cir. 1974).

30. 302 So. 2d 903, 909 (La. 1974).

31. 308 So. 2d 302 (La. App. 1st Cir. 1975).

32. 310 So. 2d 648 (La. App. 1st Cir. 1975).

33. The net value of the wife's assets at the time of trial was $12,800.

34. "We see no reason why she should not be required to deplete the liquid assets she received in the settlement to provide her own food and clothing. . . . The house has provided for the wife's shelter; and the liquid assets, *until they are all consumed*, should be used to provide her food and

monthly income of $222. The total value of the community property, consisting of thrift funds, annuity funds, equity in the house, rental property, and a savings account was $47,000; the wife also owned land in Mississippi worth approximately $1,650.[35] Because the thrift and annuity funds could not be enjoyed by either the husband or wife until the husband reached retirement age, the court valued the wife's property at a little over $15,000. Citing *Smith* and *Frederic*, the court determined that the wife had demonstrated insufficient means for her support. Particularly in comparison to *Smith*, the court assumed the relevancy of the nature of the wife's assets:[36]

> If the nature of the property, *such as its liquidity*, is relevant to a determination of its availability to the wife's maintenance, then it is significant that between the *Smith* case and our present facts there are other notable differences. In *Smith*, the $20,000 worth of assets consisted largely of U.S. Government war bonds and notes due the wife by the husband, which are not so distant from being liquid assets, whereas in the facts of the case before us, the conversion of the property into liquid assets would require the sale of the family home, and the resulting additional expense . . . .[37]

In addition to distinguishing the liquidity of assets in *Smith* and *Bryant*, the court considered as most significant the "difference in money values in the quarter century that separates the two cases."[38]

Frederic and its progeny contain a much needed reap-

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clothing. This, of course, does not prevent her from petitioning the court at a later date *when her liquid assets have been depleted* or upon some other change of circumstances, but until such occurs, she has sufficient means for her own support" (emphasis added). 308 So. 2d 302, 308 (La. App. 1st Cir. 1975).

35. Bryant v. Bryant, 310 So. 2d 648, 650 (La. App. 1st Cir. 1975).

36. *Id.* "*Smith* was decided in 1950; *Frederick* [*sic*], in 1974. In comparing the two fact situations, *Frederick* [*sic*] recognized the necessity for 'making allowances for the differences in money values.' Another difference between the facts, noted the court, was that *Frederick* [*sic*] involved $20,700 in liquid assets while in *Smith* the wife possessed $20,000 worth of property only, no liquid assets. This made *Frederick* [*sic*] the stronger case for denying alimony."

37. *Id.* (emphasis added).

38. *Id.* at 651.

praisal of *Smith*, in light of twenty-five years of economic recession and inflation. In *Bryant*, as in *Frederic*, the courts in applying *Smith* realistically considered the difference in value of assets worth $20,000 in 1950 and assets worth essentially $15,000 in 1975. This realistic and flexible approach to the application of *Smith* was long overdue, particularly since post-divorce alimony is supposedly a mere "gratuity in the nature of a pension."[39]

The relevancy of the liquidity of the wife's assets may create problems. Difficulty exists in determining whether or not a particular asset is liquid. In *Smith*, according to the court in *Bryant*, the U.S. Government war bonds and notes due the wife by the husband were "not so distant from being liquid assets."[40] The matured bonds which the wife received in *Webster* in the community property settlement were considered liquid assets. Of course, cash and checks should be considered liquid assets.[41] In contrast, the thrift and annuity funds in *Bryant*, which neither wife nor husband could enjoy until his retirement, were considered nonliquid assets. No determination has yet been made concerning the liquidity of such items as deposits in a savings account,[42] unmatured certificates of deposit, stocks and bonds, and tangible property (automobiles, furniture).[43]

Furthermore, in addition to the difficulty in separating liquid from nonliquid assets, the court in *Webster* would require the wife to entirely deplete her liquid assets before claiming alimony.[44] Presumably, before the assets are de-

39. Frederic v. Frederic, 302 So. 2d 903, 906 (La. 1974); Bryant v. Bryant, 310 So. 2d 648, 649 (La. App. 1st Cir. 1975). *See also* Hays v. Hays, 240 La. 708, 124 So. 2d 917 (1960); Brown v. Harris, 225 La. 320, 72 So. 2d 746 (1954).

40. Bryant v. Bryant, 310 So. 2d 648, 650 (La. App. 1st Cir. 1975).

41. *Id.* Frederic v. Frederic, 302 So. 2d 903 (La. 1974); Webster v. Webster, 308 So. 2d 302 (La. App. 1st Cir. 1975).

42. *See* Bryant v. Bryant, 310 So. 2d 648, 650 n.1 (La. App. 1st Cir. 1975): "In her tax return for 1973 Mrs. Bryant reported interest income of $112 for that year from savings accounts. She was questioned about this at the trial and while the record is not entirely clear in this regard, it would appear that neither the interest nor the principal in these accounts actually belonged to her .... Counsel for the husband was apparently satisfied with Mrs. Bryant's explanation of this item, because he did not pursue it further."

43. With respect to immovable property, the court made the following statement: "[I]n the facts of the case before us, the *conversion* of the property *into liquid assets* would require the sale of the family home, and the resulting additional expense. . ." (emphasis added). *Id.* at 650.

44. Webster v. Webster, 308 So. 2d 302, 308 (La. App. 1st Cir. 1975).

pleted, the wife could retain counsel to file a motion or petition seeking alimony, so that the depletion of her liquid assets would coincide with the judicial hearing. Careful planning by the wife and her attorney is obviously necessary. The question still remains to what extent the wife will be required to deplete those assets considered nonliquid before she will be entitled to alimony. *Webster* simply states that she may apply to the court for alimony once her liquid assets have been consumed. In *Smith* the wife in possession of $20,000 worth of capital assets (at that time liquidity of the assets was not an issue) was considered as possessing sufficient means for her maintenance. Would the wife in *Frederic*, under the language contained in *Webster*, be entitled to alimony after exhaustion of the $20,700 check, even though her interest in the community property exceeded $73,000? Presumably not.[45] The question unanswered in *Smith* remains: "To what extent should the wife be required to exhaust her capital before seeking alimony?"[46]

DUAL STATUS

In *Warren v. Richard*,[47] the Louisiana Supreme Court held that a child may recover for the wrongful death[48] of its biological father to the exclusion of the decedent's legitimate father and mother, even though the child is presumed under state law to be the legitimate issue of another man.[49] The

45. The court itself in *Frederic* considered the wife's interest in the community as well as the $20,700 check in deciding that the wife had sufficient means for her maintenance. Frederic v. Frederic, 302 So. 2d 903, 906 (La. 1974).

46. *See* quotation in note 21, *supra*; Smith v. Smith, 217 La. 646, 655-56, 47 So. 2d 32, 35 (1950).

47. 296 So. 2d 813 (La. 1974).

48. The action for wrongful death is created by LA. CIV. CODE art. 2315, which reads in part: "The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased."

49. A presumption of paternity is established by LA. CIV. CODE article

court concluded that, at least with respect to the wrongful death statute,[50] such a child occupies a dual status, legitimate in relation to the husband of the mother and illegitimate in relation to the biological father. An explicit result of the holding in *Warren* is that a child enjoying dual status may recover for the wrongful deaths of both its legitimate and its biological fathers.[51]

Two cases recently decided by the courts of appeal illustrate problems of dual status raised by *Warren*. In *Succession of Mitchell*,[52] the First Circuit Court of Appeal held that a child presumed to be the legitimate issue of another man cannot be legitimated by the subsequent marriage of its biological father to its mother. The dubious point of distinction from *Warren* is that *Mitchell* deals with the right of inheritance rather than with the right to recover under the wrongful death statute.[53] In *Dugas v. Henson*,[54] the Third Circuit Court of Appeal held that a husband presumed to be the father of the child cannot disavow the child on the ground that he is the legitimated child of another.[55] No mention of *Warren* was made in the opinion. The Louisiana Supreme Court has granted certiorari in *Mitchell*[56] and denied it in *Dugas*.[57]

184: "The law considers the husband of the mother as the father of all children conceived during the marriage."

50. The court cited *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968), as controlling. Both cases dealt with the state's excluding illegitimate children from the benefits of the wrongful death statute, a practice held to be in violation of the equal protection clause.

51. "The argument rightly assumes that there is no question that the child may recover for the wrongful death of her legitimate father." Warren v. Richard, 296 So. 2d 813, 815 (La. 1974).

52. 312 So. 2d 130 (La. App. 1st Cir. 1975), *cert. granted*, 314 So. 2d 735 (1975).

53. The court relied on *Labine v. Vincent*, 401 U.S. 532 (1971), which upheld Louisiana succession laws that are strongly discriminatory against illegitimates.

54. 307 So. 2d 650 (La. App. 3d Cir. 1975), *cert. denied*, 310 So. 2d 851 (1975).

55. The court was overbroad in its statement of the law, in light of *Warren*: "This court has heretofore held that a child who is presumed to be the legitimate child of the mother's husband under LSA C.C. Art. 184 cannot also be the legitimated child under LSA C.C. Art. 198 of the actual father and mother by their subsequent marriage." 307 So. 2d 650, 654 (La. App. 3d Cir. 1975).

56. 314 So. 2d 735 (1975).

57. 310 So. 2d 851 (1975). Justice Barham dissented from the refusal of

Despite the subsequent decisions of the courts of appeal distinguishing *Warren*, the Louisiana Supreme Court's recognition of dual status is of potentially far-reaching effect, since restricting its result to the wrongful death statute is logically, if not legally, impossible. The writer believes that both the reasoning and the result are wrong in *Warren*, but a thorough critique of the case is impossible in a report of this nature. Furthermore, it appears to this writer that the court in *Warren* plunged into a legal thicket in which it is destined to wander for some time before emerging. In the course of this adventure, the seamless garment of the Code is likely to suffer some rents and tears.

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writs of certiorari: "Also it was conclusively proved that the child is the biological child of Henson, who is not the husband of the mother of the child. The child is the legitimate child of Henson." *Id.*